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No. 81-2159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,
Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware corporation, and KERR-MCGEE NUCLEAR CORPORATION, a Delaware corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Does the Atomic Energy Act, as amended, preempt the award of punitive damages in a state law tort suit arising out of radiation contamination caused by a private nuclear company?

2. If so, does the Act to that extent violate due process?

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v.

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On Appeal from the United States Court of Appeals for the Tenth Circuit

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma denying appellees' motion for judgment *n.o.v.* or new trial is reported at 485 F. Supp. 566, and is reprinted in the Appendix to the Jurisdictional Statement at 42a-126a. The opinion of the United States Court of Appeals for the Tenth Circuit affirming in part and reversing in part, together with the dissenting opinion, are reported at 667 F.2d 908 and reprinted in the Appendix at 1a-41a.

JURISDICTION

Kerr-McGee and the Solicitor General have questioned whether the Court has appellate jurisdiction in this case under 28 U.S.C. § 1254(2), and the Court has postponed determination of that question. For the reasons that follow, this case is properly before the Court on appeal.[1]

[1] The timeliness of the appeal is demonstrated in the Jurisdictional Statement, at p. 2.

1. Section 1254(2) provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." Those prerequisites are met in this case.

In Oklahoma, "[t]he availability of punitive damages is controlled by statute." *Phillips Machinery Co. v. LeBlond, Inc.*, 494 F.Supp. 318, 325 (N.D. Ok. 1980); see also *Dayton Hudson Corp. v. American Mut. Lia. Ins. Co.*, 621 P.2d 1155, 1158-60 (Ok. 1980). The statute provides that a jury may award such damages "[i]n any action for the breach of an obligation not arising from contract." 23 O.S. § 9. See *Thiry v. Armstrong World Industries*, —— P.2d ——, 54 Ok. Bar. Assn. J. 782, 783 (March 22, 1983) (the "statutory scope" of § 9 authorizes a jury to award punitive damages, upon the requisite showing of culpability, "in *any action*" other than for breach of contract) (emphasis in original). The district court, therefore, upon finding that the evidence in this case would support a finding for plaintiff under this statute, was required by the statute to submit the issue of punitive damages to the jury, *State ex rel. Pollution, etc. v. Kerr-McGee Corp.*, 619 P.2d 858, 866 (Ok. 1980), and to instruct, as the court here did, that the jury could award punitive damages in this case if it found that the circumstances specified in the statute were present, i.e., if Kerr-McGee was "guilty of oppression, fraud, or malice, actual or presumed." (App. 112a, quoting the language of § 9).

On appeal to the Tenth Circuit from the jury's award, the briefs for both sides acknowledged that in Oklahoma the availability of punitive damages is controlled by the Oklahoma statute.[2] And, in deciding whether the award

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[2] The Brief of Plaintiff-Appellee in the court of appeals began by noting (at p. 2) that plaintiff's contention was that punitive damages in this case were "justifi[ed] . . . under 23 O.S. § 9;" and the brief explained in its argument that "Oklahoma allows punitive

of punitive damages was permissible, the court of appeals "consider[ed] only one [argument], the claim of federal preemption" (App. 21a). Stating that it was "requir[ed] . . . to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards . . . ." (App. 24a), the court struck down this "award of exemplary damages under state law" on the ground that it "intru[ded]" on the federal agency's authority and therefore was preempted. *Ibid.*

In these circumstances, the court of appeals has necessarily held that 23 O.S. § 9, as applied to nuclear operators covered by the Atomic Energy Act, is "repugnant to the . . . laws of the United States." 28 U.S.C. § 1254(2).[3] And, as the Solicitor General correctly acknowledges, this Court's decisions make clear that "[s]ection 1254(2) may be invoked where the court of appeals has held that a state law is invalid, not in all conceivable circumstances, but only as applied to the facts of the case." Brief for the United States as Amicus Curiae, p. 6. See *Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton v. Evans*, 400 U.S. 74, 76 n.6, 87-88 (1970); *City of Detroit v. Murray Corp.*, 355 U.S. 489, 491-492 (1958).[4] Ac-

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damages to be imposed in cases where fraud, oppression, gross negligence, or malice are present, 23 O.S. § 9" (*id.*, p. 67). The Brief of Defendants-Appellants likewise stated (at p. 59) that "[r]ecovery of punitive damages under Oklahoma law is limited by statute," citing § 9; discussed how the Oklahoma courts have "interpreted the statute" (*ibid.*); and described the kind of evidence necessary "[t]o meet the requirements of 23 O.S. § 9" (*id.*, p. 60).

[3] As the Solicitor General acknowledges "[t]he holding of invalidity contemplated by Section 1254(2) encompasses determinations that the state law is preempted by a federal statute." Brief for the United States as Amicus Curiae, p. 6 n.6. See, e.g., *Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); C. Wright, A. Miller & E. Cooper, 17 *Federal Practice and Procedure: Jurisdiction*, § 4037, p. 46 (1978).

[4] See also J. Moore, H. Bendix & B. Ringle, 12 *Moore's Federal Practice: Supreme Court Jurisdiction and Practice*, ¶ 435.01[1] at p. 6-51 (1982).

cordingly, this case is properly here on appeal under § 1254(2).

2. Kerr-McGee and the Solicitor General make much of the fact that the court of appeals did not expressly declare that it was holding § 9 invalid as applied.[5] But this Court has recognized that where the basis of a lower court's ruling is that the application of a statute to particular circumstances is invalid under federal law, an appeal properly lies even if the lower court "did not expressly hold [the statute] unconstitutional as applied." *California v. Grace Brethren Church*, —— U.S. ——, 102 S.Ct. 2498, 2506 (1982) (28 U.S.C. § 1252). This Court's appellate jurisdiction is determined by what the lower court actually held, not by the form of words the lower court used to express that holding.

3. The Solicitor General also claims that the court of appeals did not address arguments that had been advanced by Kerr-McGee that, if adopted, would have overturned the award of punitive damages as a matter of *state* law.[6] The only argument advanced by Kerr-McGee to the Tenth Circuit apart from preemption was that the evidence respecting "oppression, fraud or malice" did not warrant submitting the punitive damage issue to the jury;[7] there was no contention that the district court had misconstrued the state statute.[8] But even if there *had*

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[5] See Motion to Dismiss, pp. 7-8; Brief for the United States as Amicus Curiae, pp. 7-8.

[6] See Brief for the United States as Amicus Curiae, pp. 8, 9-10. As noted, the court of appeals stated that with respect to the issue of punitive damages it had "consider[ed] only one [argument], the claim of federal preemption." (App. 21a).

[7] Brief of Defendants-Appellants to Tenth Circuit, pp. 59-61. Kerr-McGee also contended that the amount of the jury's punitive damage award was excessive, *id.*, pp. 68-70.

[8] The Solicitor General has conjured up a number of ways in which the Oklahoma Courts might give a limiting construction to 23 O.S. § 9 that would render it inapplicable to this case. Brief for the United States as Amicus Curiae, pp. 9-10. None of these limit-

been a claim of improper construction of the state statute, there would be no merit to the Solicitor General's contention that the court of appeals' failure to resolve that claim would affect this Court's appellate jurisdiction.

Under parallel jurisdictional statutes, the Court has consistently rejected such suggestions. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979):

> Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question . . . this Court has jurisdiction to review the judgment . . . . We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground. [*Id.* at 276-277, quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).] [9]

4. Finally, the Solicitor General suggests that 23 O.S. § 9 is "a statutory declaration of common law," and that such an enactment should not be considered a "State statute" for purposes of § 1254(2).[10] No state statute has ever been held by this Court not to be a "State statute"

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ing constructions was sought by Kerr-McGee in the court below. The appellate jurisdiction surely is not defeated because state law grounds can be hypothesized that not only were not the *basis* for the decision of the court below but were not even *advanced* to the court below. Moreover, as Kerr-McGee's failure to assert these theories below suggests, they are specious in light of Oklahoma decisional law. We showed this in Appellant's Brief in Response to Brief of Solicitor General and in Opposition To Appellees' Motion to Dismiss or Affirm, pp. 7, 9-10. See also *Thiry, supra* (§ 9 authorizes punitive damages "in any action" other than for breach of contract).

[9] See also *United States v. Raines*, 362 U.S. 17, 20 (1960); *United States v. Clark*, 445 U.S. 23, 25-26 and n.2 (1980); *Delaware v. Prouse*, 440 U.S. 648, 652 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-568 (1977).

[10] Brief for the United States as Amicus Curiae, p. 10 and n.15.

for purposes of § 1254(2).[11] If words are to retain their meaning, the Solicitor General's contention must be rejected.

What is more, in § 9 the Oklahoma legislature has not simply declared what the common law would otherwise necessarily have provided. Absent a statute, the highest state court would be free to disapprove punitive damages. See, e.g., Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518 (1957). That happened in Colorado, until reversed by statutory enactment. *Murphy v. Hobbs*, 7 Colo. 541 (1884), see note, *supra*, 70 Harv. L. Rev. at 518, n.11. In a few other states, punitive damages are available only for certain torts and not others, *ibid.* at 518, nn. 6,7. Because of § 9, the Oklahoma Supreme Court is not free to abandon punitive damages, or to hold them unavailable in any kind of tort action. *Thiry, supra.* To the contrary, § 9 reflects "the Oklahoma legislature['s] . . . strong and current interest in the availability of punitive damages", *In re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594, 627 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981), and represents the "legislated policy" of the state to which its courts must adhere, *Dayton Hudson Corp., supra*, 621 P.2d at 1159.

The decision below, because it invalidates the "legislated policy" of the state, creates just that confrontation between the federal judiciary and a state legislature for which appellate jurisdiction in this Court was provided in 28 U.S.C. § 1254(2).

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[11] Nor has it been deemed significant that a state statute deals with a subject which would otherwise be governed by common law. See *Dutton v. Evans, supra*, 400 U.S. at 76 n.6, 83 n.15 (appeal held proper under § 1254(2) where court of appeals held that a Georgia statute defining the admissibility of statements of co-conspirators was unconstitutional as applied).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause (Article VI, Clause 2) and Fifth Amendment to the United States Constitution are reprinted in the Appendix to the Jurisdictional Statement (hereinafter "App.") at 137a.

The statutory provisions relevant to this Court's jurisdiction, 28 U.S.C. §§ 1254, 2103, are reprinted at 137a-138a.

Provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, pertinent to the preemption issue presented on this appeal are reprinted at App. 138a-151a.

The Oklahoma punitive damages statute, 23 O.S. § 9, is reprinted at App. 151a.

STATEMENT OF THE CASE

A. Proceedings Below

This is a state law tort action initiated in the United States District Court for the Western District of Oklahoma, with jurisdiction based on diversity of citizenship. Appellant (plaintiff), the father of Karen Silkwood, is the administrator of her estate, the sole beneficiaries of which are her three minor children. (Karen Silkwood is referred to hereinafter as "Silkwood"). Appellees (defendants) are Kerr-McGee Nuclear Corp., which operated the plant at which Silkwood was employed, and Kerr-McGee Corp., the parent corporation. (The jury found that the former corporation was the "mere instrumentality" of the latter, I J.A. 203; App. 126a.[12] The two are referred to hereinafter jointly as "Kerr-McGee".)

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[12] The Court has waived the requirement for preparing a joint appendix in this Court. As used herein, "J.A." refers to the Joint Appendix in the Tenth Circuit. That Joint Appendix is in five volumes, and is cited herein by "[volume] J.A. [page]." "App" refers to the Appendix accompanying the Jurisdictional Statement in this Court.

The complaint sought both actual and punitive damages for the injuries to person and property suffered by Silkwood when she was contaminated by plutonium from the nuclear fuel fabrication plant operated by Kerr-McGee. Following an eleven-week trial, and two-and-one-half days of deliberation, the jury returned a verdict of $505,000 actual damages ($5,000 for property damage and $500,000 for personal injury) and $10,000,000 punitive damages. I J.A. 3-5, 202-203; App. 115a.

Kerr-McGee appealed from all elements of the award. The Tenth Circuit affirmed the $5,000 property damage award, holding that compensatory damage awards under state law are not preempted by the Atomic Energy Act. The court set aside the $500,000 personal injury award, reversing the district court's construction of the Oklahoma Worker's Compensation Act and holding that that Act precludes compensation in a tort action for injuries resulting from off-worksite contamination.[13] The court also set aside the punitive damage award on the sole ground that the Atomic Energy Act preempts the states' authority to award punitive damages for radiation injuries inflicted by companies operating facilities covered by that Act. It is the last of these holdings that is the subject of this appeal.

B. The Facts

As the jury returned a verdict for plaintiff, the evidence must be viewed in the light most favorable to plaintiff. Our recitation of the facts proceeds accordingly.

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[13] Even with respect to otherwise covered events, the Worker's Compensation Act does not preclude lawsuits over intentional or willful conduct. There is substantial evidence supporting a claim of intentional or willful injury in this case (see, *e.g.*, App. 132a-136a). Following disposition of this appeal, plaintiff will further pursue this issue in the district court. See Jurisdictional Statement, p. 6, n.5; Appellant's Brief in Response to Brief of Solicitor General and in Opposition to Appellees' Motion to Dismiss or Affirm, pp. 8-9.

Silkwood was employed as a laboratory analyst at Kerr-McGee's Cimarron plant from August, 1972, until her death on November 13, 1974. The plant—which began operations in 1971 and was closed permanently in 1975—produced plutonium-based fuel rods for an experimental breeder reactor. Plutonium is a carcinogen, and one of the most toxic substances known, even in microscopic quantities. It is particularly dangerous when inhaled, and there is no known safe method for removing it from the lungs. (App. 3a; III J.A. 912-919, 926-928, 937-938, 980-983, 1054-55; Tr. 5763).

The Cimarron plant was licensed by the Atomic Energy Commission ("AEC"), and a condition of the license was compliance with regulations laid down by the AEC. There is no known safe level of exposure to radiation (App. 64a). AEC regulations enjoined all licensed operators to "make every reasonable effort to maintain radiation exposures, and release of radioactive materials in effluents to unrestricted areas, as low as practicable." (App. 65a).[14]

It was understood by the AEC and the industry that the AEC's regulations reflected only the minimum care that should be given; that compliance was no guarantee of safety; and that the licensee was expected to do more than was minimally required if demanded by reasonable prudence. (App. 61a-66a; IV J.A. 1511, 1523.).

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[14] In addition, the regulations provided prescribed numerical exposure levels—ten times higher for employees than for members of the public—which licensees were not to exceed. (App. 69a-70a). As this ten-fold dichotomy suggests, these levels were not considered *safe*, but were considered benchmarks that if exceeded could subject the operator to loss of license (IV J.A. 1523). The "as low as practicable" standard was prescribed in the regulations in recognition that the numerical levels were "no guarantee of safety" (*Id.* 1527, see also App. 65a; II J.A. 942). Subsequent to events giving rise to this lawsuit, the "as low as practicable" standard was changed to "as low as is reasonably achievable" 40 Fed. Reg. 58847 (1975); 10 C.F.R. § 20.1(c).

In separate incidents on November 5, 6, and 7, 1974, Silkwood was contaminated with plutonium from Kerr-McGee's facility. On November 5, after she had been working in the plant's laboratory, a monitoring device detected contamination on Silkwood's left hand, right wrist, upper arm, neck, hair and nostrils. (Contamination of the nostrils is the most alarming form of surface contamination, for it is the likeliest indicator that plutonium has been inhaled). Silkwood was immediately "decontaminated" (i.e., the surface contamination was scrubbed away) and at the end of the day the monitors detected no surface contamination. (App. 4a-5a).

The next day, after performing paperwork in the laboratory, Silkwood monitored herself and discovered contamination on her hands, forearms, face, and neck. Later in the day, a subsequent monitoring disclosed contamination in her nostrils as well. Again, she was decontaminated. (App. 5a).

On the third day, November 7th, Silkwood went directly to the health physics office upon arriving at the plant. Monitoring disclosed contamination in her nostrils, hands, arms, chest, back, neck, and right ear. Because it was apparent that the site of contamination was outside the plant, a company decontamination squad was dispatched to Silkwood's apartment, and found contamination in several rooms, and on a package containing luncheon meat and cheese in her refrigerator. (App. 5a; IV J.A. 1291-92, 1295-97).

It was stipulated by the parties that the plutonium that had caused Silkwood's contamination had come from the Kerr-McGee plant (App. 95a), although the precise manner by which it had escaped was never officially determined.[16] The levels of contamination found on November

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[16] The court charged the jury that it would be a complete defense if Silkwood had intentionally carried the plutonium from the plant (App. 100a). In response to a specific interrogatory, the jury found that this was not the case (I J.A. 202). The court below concluded that this finding was consistent with the evidence (App. 8a).

7 on Silkwood's body and in her apartment greatly exceeded the levels of prior days (IV J.A. 1316; Tr. 4704-11), and triggered exceptional procedures. Decontamination of Silkwood's apartment—which entailed the destruction of virtually all her personal belongings—was necessitated, and required nearly a month to complete. (II J.A. 385, 732, 748-49).[17] Silkwood herself was sent to the Los Alamos Scientific Laboratory for testing to determine the extent of contamination of her vital body organs. (App. 6a).

Witnesses who observed Silkwood following the contaminations testified that "[s]he was fearful of a slow death from cancer, became hysterical at times, and approached a nervous breakdown as she became the focus of federal agency and industry investigations into the incident" (App. 83a).

Silkwood returned to work at the Cimarron plant on November 13. That night, she was killed in an automobile accident. (App. 6a).[18]

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[17] As Silkwood sat outside her apartment—in an apparent state of shock and hysteria—while the decontamination team removed her personal belongings, a Kerr-McGee lawyer arrived on the scene, questioned her, and got her to sign a statement. (IV J.A. 1474-76; II J.A. 386-387). Kerr-McGee did not similarly send a doctor (IV J.A. 1476).

[18] Silkwood's death resulted from an automobile accident while she was driving alone *en route* to a meeting with a New York Times reporter at which she was to present evidence of safety violations at the Kerr-McGee plant (App. 6a, 133a-134a). Just before entering her car, Silkwood showed the documents to a fellow worker; following the automobile crash, the documents were never located. (App. 136a). Among the matters as to which Silkwood had claimed to have found evidence was that Kerr-McGee was doctoring photographs of defective fuel rod welds. Subsequent government investigations found that photographs had indeed been touched up to obscure defects in the negatives in or near the critical weld areas. (App. 136a).

There was expert testimony that the degree of contamination suffered by Silkwood produced immediate physical injury, including initiation of the cancer process and genetic damage that could have been transmitted to any child that she bore.[19] An autopsy following her death estimated that her body contained at least 2½ times the *lifetime* dose for members of the public set out in the AEC's numerical standard,[20] and at least one-fourth the lifetime dose set out therein for employees of nuclear facilities. (App. 69a). Expert witnesses testified that the actual amount of contamination may have been many times higher than the estimate.[21]

James Keppler, the AEC's Regional Director at the time of Silkwood's contamination, testified that the plant during its five-year existence was cited by the AEC for approximately 75 violations of AEC regulations (IV JA 1513); that "Kerr-McGee management [was] not committed to ALAP [as low as practicable] on exposures" (*id.* 1520-21); and that contamination incidents got "short shrift" from management so long as they did not exceed the numerical exposure limits (*id.* 1521) because the AEC lacked "regulatory teeth" to enforce the "as low as practicable" standard (*id.* 1522).

Dr. Karl Z. Morgan, who for 29 years was Director of the Health Physics Program at Oak Ridge National Laboratory, and is one of the world's leading experts on radiation health and safety (II J.A. 368-374), testified that until he studied Kerr-McGee's operation of the Cimarron plant "I could not imagine that such a lackadaisical attitude could be developed in an organization in reference to the health and safety of the people" (III JA 1055). Kerr-McGee's willingness to continue operations despite contamination incidents and without first

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[19] III J.A. 921-929, 934-935.

[20] See n. 14, *supra*.

[21] II J.A. 809; III J.A. 990-992, 1004-06; IV J.A. 1626-27.

removing the sources of contamination was, according to Dr. Morgan, "inexcusable and irresponsible" (*id.* 1057, see also 1055-56). He testified that Kerr-McGee's health physics program was "very weak and inadequate"; there was inadequate training of employees, inadequate equipment, and unqualified health physics personnel (*id.* 1057, 1076-77).[22]

> It would take hours to even summarize the faults I found . . . [T]he instructors were not motivated to follow the rules, they broke them repeatedly, many of the employees went to work, worked quite awhile before they had any instructions at all. There were cases where the employee would work and without any instructions, and then not even know how to call the health physicist when the alarms went off. The rule was, 'Well, you've got to wait until you get a whole class, and then we'll get them together and teach them, it is cheaper that way'" [*id.* 1077-78].

There were 574 reported contamination incidents during the five years that the plant operated (P.Ex. 28). Dr. Morgan testified:

> This is the evidence that the people [employees] aren't really concerned about the radiation. They don't realize that it is this contamination that might get into their lungs, into their system, that causes cancer. One of the things that worried me so much was that in all the training programs, in the manuals that I've looked over, there was essentially nothing mentioned about a 'cancer risk'. It is like asking me to go in a lion's cage and not telling me there are any lions in the cage" [*id.* 1079-80].

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[22] The risks associated with the last of these problems were exemplified by Kerr-McGee's effort, following Silkwood's contamination, to get her to take an unauthorized and dangerous drug (*id.* 1057-58). Kerr-McGee's chief of health physics had his degree in poultry husbandry (IV J.A. 1315).

There was evidence that the failure to advise employees of cancer hazards was intentional.[23]

Dr. Morgan—contrasting the safety practices at this plant with the industry norm—testified that Cimmaron was the worst facility from the standpoint of safety he had encountered in his 35 years as a consultant to the nuclear industry (*id.* at 1055-58). It was his conclusion that Kerr-McGee's practices reflected a "callous" and "wanton" disregard for the health and safety of employees (Tr. 1552, 1563, 1567).

Kerr-McGee's inventory system was so lax that three years after the plant was closed, over forty pounds (18,160 grams) of plutonium still could not be located (Tr. 7963-65; II J.A. 384; III J.A. 1494). Evenly distributed, *one-half gram* of plutonium—which could be removed from the plant without detection under the security system chosen by Kerr-McGee—is enough to give 35 million people their lifetime lung burden (II J.A. 377-379; IV J.A. 1492-93).[24]

C. Proceedings Respecting Punitive Damages

Under 23 O.S. § 9, a jury is authorized to award punitive damages "where the defendant has been guilty of oppression, fraud or malice, actual or presumed,"

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[23] A company official acknowledged at trial that in preparing the training manual he had copied the description of radiation hazards verbatim from a published text, except that wherever the word "cancer" appeared in the text he had substituted highly technical words (Tr. 5813-19; P. Ex. 283; D. Exs. 5, 6, 7)—words that were incomprehensible to the young workers, many from rural backgrounds, who comprised the plant's work force. (III J.A. 1108, 1120-21; Tr. 2471, 5736-37, 6525-27, 8685-94).

[24] The evidence recited in text is merely a portion of the voluminous evidence introduced by plaintiff in support of the claim for punitive damages. See also, *e.g.* II J.A. 433, 436-444, 481-483; III J.A. 1015-22, 1026-28, 1036-37, 1055-57, 1059-62, 1099-1102, 1106-08, 1111-12, 1120-21, 1128-30; IV J.A. 1324-25, 1406-07, 1520-21, 1538-39; Tr. 8195; P. Ex. 28, pp. 102-104.

and it is reversible error for a trial court not to submit the issue of punitive damages to the jury where the evidence would support a finding of the requisite culpable intent (see p. 2, *supra*). In accordance with Oklahoma Supreme Court decisions construing this statute, the trial judge in the instant case charged the jury that such damages are available "for the sake of example and by way of punishment" for "evil intent"; and that such intent may be found when a defendant is "grossly and wantonly reckless in exposing others to dangers," or exhibits "reckless disregard of another's rights, manifesting an indifference to the consequences of the act" (App. 112a-113a).[25]

When, following the jury's verdict, Kerr-McGee moved, *inter alia*, to set aside the punitive damage award on the ground that the evidence did not support a finding of the state of mind requisite to justify such an award, the trial judge, in denying the motion, stated that there was evidence to support a finding that Kerr-McGee was "aware of defects within [the] facility that would render likely repeated exposures of employees to plutonium, but did nothing to correct it" (App. 72a); that the plant was run by an "uninformed or indifferent management" (App. 86a); and that there was "poor training, poor security" and a workforce not educated "to the hazards of plutonium" (App. 85a).

In the post-verdict motion, Kerr-McGee also contended that punitive damages were preempted if Kerr-McGee's conduct was in substantial compliance with AEC regulations. The District Court noted that there was ample evidence to support a jury verdict of punitive damages here even if their availability were limited to situations where there was not substantial compliance

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[25] This charge was in accord with decisions of the Oklahoma Supreme Court. See pp. 44-45, n.47, *infra*.

with AEC regulations (App. 75a-76a).[28] But, as the District Court had refused to so limit the availability of punitive damages in its instructions to the jury, acceptance of Kerr-McGee's legal proposition would have required a new trial. Accordingly, the District Court addressed that proposition on its merits.

In rejecting Kerr-McGee's contention, District Judge Theis reasoned as follows:

> Little . . . need be said on this Court's failure to instruct the jury that substantial compliance with government regulations would bar an award of punitive damages. The existence of wanton conduct depends upon the actor's or tortfeasor's mental attitude at the time of the conduct. *Tappen v. Ager*, 599 F.2d 376, 382 (10th Cir. 1979). The culpable mental attitude necessary for punitive damages was set forth in the punitive damage instruction. For the same reason that mere compliance with government regulations cannot necessarily be found consistent with the reasonable person standard, so too it cannot necessarily be found consistent with an attitude and conduct devoid of that state of mind for which an award of punitive damages is appropriate.
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> • • • •
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> **The character of the conduct and the state of the actor's mind control the propriety of punitive damages, and not merely whether that conduct complies or fails to comply with a government regulation. See Restatement, *Torts* § 908(2) com. e at 556-57 (1939). [App. 70a-72a].**

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[28] **At trial, plaintiff established that, as to Silkwood, Kerr-McGee violated AEC regulations governing radiation exposures for the general public and nuclear workers as well as the as low as practicable standard. Additionally, Kerr-McGee repeatedly violated AEC requirements with regard to inventory and accountability controls, physical security, training, management and reporting. See pp. 12-14, *supra*.**

On appeal, Kerr-McGee contended that the Atomic Energy Act preempts punitive damages where there has been "substantial compliance with AEC regulations" and that the trial judge erred in not so instructing the jury.[27] The Tenth Circuit panel majority (Judges Logan and McKay) ruled that the preemptive effect of the Act was much broader than that urged by Kerr-McGee, holding that punitive damages may not be awarded for radiation injuries inflicted by a nuclear operator irrespective of whether the operator violated AEC regulations.

The panel majority recognized that Congress expressly decided that cases such as this are to "remain subject to the traditional rules of tort law" (App. 19a). The panel majority accordingly held that compensatory damages can be awarded under whatever standard of liability state law prescribes—even if the operator has fully complied with AEC regulations (App. 20a). The panel majority further acknowledged that the congressional decision to permit application of "the traditional rules of tort law" "may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them" (App. 22a), and that "[a]rguably there should be a strong presumption against preemption of state laws affecting such vital interests of its citizens as those involved in the instant case" (App. 24a). But despite these premises, the panel majority found preemption because Congress intended to preempt the field of licensing and safety regulation of nuclear facilities; punitive damages are "punishment for bad practices or to deter future practices involving exposure to radiation"; and accordingly punitive damages constitute "state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear materials" (App. 24a).

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[27] Brief of Defendants-Appellants to 10th Cir., pp. 61-64.

Judge Doyle dissented. He reasoned:

> It is one thing to preempt the area which the federal government has undertaken to license and regulate; it is another for a court to read into the Act an intent to preempt a form of damages which would otherwise be a part of an isolated private lawsuit. This conclusion is particularly apt where no evidence exists either on the face of the Act or otherwise of an implied purpose to so preempt by the Congress.[1] Indeed, the fact that private lawsuits are tolerated without any limitations argues against the majority position.
>
> [1] The fact that Congress has expressly excepted the private tort action without restriction argues against any implied intent to preempt a part of such action.
>
> [App. 32a-33a.]

The majority's recognition that Congress intended to allow compensatory damages under state law wholly refuted, in Judge Doyle's view, its conclusion that punitive damages are preempted:

> If a tort action does not interfere, the award of exemplary damages cannot impede federal government regulation. After all, the award of a large amount of actual damages can be equally punishing. It is the money which causes the suffering, not the designation.
>
> **The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284, preempts the field of nuclear licensing and regulation. But until now, no effort has been made to abolish damages in a private civil action. No collision exists nor is one possible between the simple state law inspired tort action and the federal government. To say that preemption prevents the imposition of exemplary damages in connection with a civil judgment carries the preemption concept far beyond anything that could have been intended or could ever be implied. [App. 38a].**

SUMMARY OF ARGUMENT

A. To justify preemption of traditional remedies in state law tort suits, there must be powerful evidence that Congress so intended. Here, the evidence is entirely to the contrary. The express and consistent congressional judgment has been that, with limited exceptions not relevant here, state tort law is to govern in suits brought against private companies in the nuclear industry by those who have suffered injuries from radiation. Thus, the authoritative legislative materials expressly state that "the claimant's right to recovery . . . is left to the tort law of the various States" (p. 30, *infra*); claims will "remain subject to the traditional rules of tort law" (p. 35, *infra*). In a few specific instances unrelated to punitive damages Congress has determined to limit a particular facet of state tort law, but those instances have been accompanied by legislative statements that in all other respects state tort law is to continue to apply (pp. 33-36, *infra*). The one proposal that Congress expressly forbid punitive damage awards was not adopted by Congress, and the AEC (now NRC) has administered the statute on the understanding that punitive damages are not preempted (pp. 36-40, *infra*).

B. The foregoing legislative history controls the answer to the preemption question posed in this case: Congress did not intend to preempt the states' right to award punitive damages. The court below reached a contrary result by ignoring this direct evidence of legislative intent respecting tort actions, and instead drawing inferences from Congress' treatment of a different subject: the role of the states in administrative regulation of radiation safety. The court below overlooked that Congress has marked out a very different role for the states in providing remedies in tort suits involving nuclear facilities than in the licensing and administrative regulation of such facilities; the court erred by transposing Congress' decision on the latter subject to

the former, in disregard of the quite different answer Congress provided there.

Moreover, even on its own terms the decision of the court below cannot withstand analysis. The court below acknowledged that Congress unquestionably left to state tort law the task of providing *compensatory* damages, but held nonetheless that *punitive* damages are "regulatory" and thus preempted. However, to the extent that state law tort suits against private nuclear companies may be said to be "regulatory," it is the compensatory damages, not the punitive damages, that "regulate" the companies' conduct, by setting the standard for that conduct. Punitive damages are not assessed for simple failure to meet a standard of conduct. Punitive damages are awarded because conduct is the product of ill-will or a reckless state of mind. States have a special interest in policing conduct motivated by a malicious state of mind that endangers the health and safety of their citizens—whether that conduct involves operating a nuclear facility or driving a car.

This Court has long recognized that the punishment of outrageous conduct is wholly peripheral to federal regulatory concerns but lies at the core of "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Unions* v. *Garmon*, 359 U.S. 236, 243-244.

ARGUMENT

THE ATOMIC ENERGY ACT DOES NOT PREEMPT THE AWARD OF PUNITIVE DAMAGES IN A STATE LAW TORT SUIT ARISING OUT OF RADIATION CONTAMINATION CAUSED BY A PRIVATE NUCLEAR COMPANY

Introduction

The following propositions are undisputed in this case: First, that there is no federal cause of action or other federal remedy for those injured by nuclear occurrences involving privately owned facilities; second, that, with certain limitations not pertinent here, Congress has expressly recognized that state tort law is to govern damage suits arising from such occurrences; and, third, that, while providing other express limitations on such state law tort actions, Congress has never expressly acted to preclude the recovery of punitive damages.

The question in this case is whether, notwithstanding these premises, Congress should be found to have intended to prohibit the exercise of the states' traditional power to award punitive damages in this category of state law tort actions.

As this Court has held:

> ". . . . It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952). [*New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973)].

Where the state right that would be abrogated is part of traditional tort law, the evidence of a congressional intent to preempt the right must be most powerful:

> [A] common-law right . . . is not to be abrogated "unless it be found that the preexisting right is so repugnant to the statute that the survival of such

> right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." [*Nader v. Allegheny Airlines*, 426 U.S. 290, 298 (1976); quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1970)].

In the absence of an express determination by Congress to preempt traditional state law tort remedies, only a showing of "irreconcilable conflict between the [federal] statutory scheme and the persistence of common-law remedies" will justify abrogating the latter on preemption grounds. *Nader*, 426 U.S. at 299.

As we now show, no irreconcilable conflict—indeed no conflict at all—exists in this case. We first demonstrate that the legislative history of the pertinent statutes evinces Congress' clear intent not to preempt traditional state law tort remedies in this area (pp. 22-41, *infra*). We then show that the analysis by which the court below carved out an exception for punitive damages is invalid, both because it finds no support in the legislative history and because it is unsound on its own terms (pp. 41-49, *infra*).

A. The Legislative History of Relevant Federal Atomic Energy Legislation Demonstrates That Congress Did Not Intend to Preempt Punitive Damages

(1) *Enactment of The Atomic Energy Act of 1954*

The Atomic Energy Act of 1954 is the point of departure for the question of congressional intent presented in this case. By that Act, Congress effected a basic change in this country's policy toward the development and use of atomic energy. The Act provided for the first time a major role for the private sector in the atomic energy field: "[W]e do not believe that any developmental program carried out solely under governmental auspices, no matter how efficient it may be, can substitute for the cost-cutting and other incentives of free and competitive enterprise." S. Rep. No. 1699, 83rd Cong. 2d Sess. (1954), at 3.

In taking that step, the 1954 Act created no federal cause of action or other means of recovery for those injured in nuclear incidents caused by private facilities. Indeed, that subject was never discussed in the legislative process leading to adoption of the Act. It was assumed by the industry and by subsequent Congresses that the intention of the Congress that passed the 1954 Act was that recovery for such injuries would be governed by state law, just as was recovery for injuries arising from conduct in other sectors of private industry. See *infra*, pp. 24-26.

Nor did the 1954 Congress address the extent to which states could by licensing or other administrative action regulate health and safety issues associated with exposure to radiation. "The whole pre-enactment legislative history of the 1954 Act in fact is barren of any indication that Congress was even aware of the preemption problem with respect to health and safety regulation." Stason, Estep, and Pierce, *Atoms and the Law* (University of Michigan, 1959) at 1005.[28]

The question of recoveries for injuries resulting from nuclear occurrences in private facilities, and the question of the permissible role of state administative safety regulation, were dealt with separately by subsequent Congresses. In 1957 and 1966, Congress addressed certain problems arising from the application of state tort law to radiation injuries caused by privately-owned nuclear fa-

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[28] The only reference to a question of state regulation in the 1954 Act was in section 271: "Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power." The history of that section shows that it was inserted in the bill by the Joint Committee on Atomic Energy to reassure the other members of Congress that the Atomic Energy Commission would not become "super power administration"; it was not meant to suggest that in any other respect Congress had consciously decided that the regulatory power of the states should be preempted. See *Atoms and the Law*, *supra*, at 1004-1005.

cilities. In 1959, Congress addressed federal-state relationships in the licensing and administrative regulation of the safety of those facilities. We discuss those subsequent enactments in chronological sequence.

(2) *Enactment of Price-Anderson in 1957*

Immediately following enactment of the 1954 Act, those private companies who, it was hoped, would enter upon the new activities opened by the Act, began to voice concerns about their exposure to potentially bankrupting liability were they to enter the field and then be responsible for a catastrophic nuclear incident. The chorus began with an industry conference held only a few weeks after passage of the Act, and escalated throughout 1955 and 1956.[29]

The cause of the concern was this: If a catastrophe occurred, state tort law would be available to the victims, whose "right prior to the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources." *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 88-89, n. 33 (1978). There was, in the aggregate, only about $60 million dollars of insurance that would be available to the emerging industry, and estimates of the potential damage awards resulting from a nuclear catastrophe were many times that amount. Private industry spread the message that it might not enter the field unless Congress took steps to insulate entrants from the bankrupting damage awards that could flow from state tort law in the event of a nuclear catastrophe.[30]

The Price-Anderson Act of 1957 was Congress' solution. The background of the legislation was stated in the

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[29] Green, *Nuclear Power: Risk, Liability and Indemnity*, 71 Mich. L. Rev. 479, 490-491 and n.54 (1973); *AEC Staff Study of the Price-Anderson Act* (1974), pp. 1-2, reprinted in Joint Committee on Atomic Energy, *Selected Materials on Atomic Energy Indemnity and Insurance Legislation*, 93rd Cong., 2nd Sess. (1974) at 1-2.

[30] See n.29, *supra*.

report of the Joint Committee on Atomic Energy, S. Rep. No. 296, 85th Cong., 1st Sess. at 1 (1957):

> When the Atomic Energy Act was passed, it was the hope of Congress that the provisions in the laws liberalizing the statutory restrictions which had hitherto given the Government a monopoly in the atomic energy field would encourage the entrance of private industry into the program, and speed the further development of the peaceful uses of atomic energy.
>
> It was brought to the attention of the Joint Committee in the 1956 hearings . . . that the problem of possible liability in connection with the operation of reactors is a major deterrent to further industrial participation in the program.

Throughout those 1956 hearings, the common understanding was that, as things then stood, state tort law would be applied in any suits arising out of nuclear incidents. *Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity*, 84th Cong., 2nd Sess. (1956), at 74-75, 161, 235. Indeed, Senators Pastore and Anderson, who were the principal Senate architects of all the atomic energy legislation in the formative years, expressed doubts as to the federal government's power to "step[] upon the sovereign rights of the individual states," *id.* at 190 (Sen. Pastore), or to "walk in and say that the law of the [federal] Government completely supplants or abrogates the laws of the State with reference to the protection of its own citizens", *id.* at 353 (Sen. Anderson).

The bill proposed by the Joint Committee and ultimately adopted by Congress eliminated the deterrent to private entry in the field with only a minimal impact upon state tort law. The bill's approach had three components: (1) the AEC was empowered to require licensees to have financial protection (which could be in the form of insurance, self-insurance, or other means) up to $60 million; (2) federal government indemnification was provided for the next $500 million; and (3) the $560 million

thus aggregated was established as the limit of liability for any one nuclear incident (with a procedure for apportioning that amount should claims arising from a nuclear incident exceed $560 million). S. Rep. No. 296, *supra*, at 19-22.

Of particular pertinence to the instant case, Congress decided that except for the limit of liability and apportionment procedure, state tort law would remain fully applicable. Thus, the Joint Committee report listed, as the first of the two "basic principles underlying the bill":

> Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity [*i.e.* $560 million]. At that point the Federal interference is limited to the prohibition of making payments through the state courts and to prorating the proceeds available. [*Id.* at 9].[31]

Because the Price-Anderson Act was not made applicable to plutonium processing plants until 1977 (after the Cimarron plant was closed), its provisions were not applicable to the instant case.[32] But Price-Anderson is

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[31] See also 103 Cong. Rec. 10712 (1957) (Rep. Price):

> The rights of the people who would be injured would be established under State laws . . . This bill is fashioned so as to preserve those rights up to the point where the funds are not available. Then the limitation of liability proceeding is established. This is the only fair way to proceed. Otherwise, you would have the Congress passing on State rules of liability and damages and you would have the Congress passing on each and every claim.

[32] Under Price-Anderson as enacted in 1957, P.L. 85-256, 71 Stat. 576, the AEC was given discretion *whether* to require plutonium processing plants to maintain financial protection (Sec. 170a); indemnification was extended only to those from whom such protection was required (Sec. 170c); and the limit of liability and apportionment provisions applied only to those indemnified (Sec. 170(e)).

[Footnote continued on page 27]

important to the issue presented in this case, for it reflects Congress' clear understanding that, except to the extent provided in Price-Anderson, the Atomic Energy Act does not preempt the application of state tort law in injury lawsuits. As a non-covered facility, the Cimarron plant did not enjoy the limit of liability or government indemnification furnished by Price-Anderson. Thus, in the case of suits arising out of injuries caused by this plant, the legislative history makes clear that "there is no interference with the State law" at all.[33]

(3) *The 1959 Amendments on "Federal-State Cooperation"*

Having dealt in 1957 with the question of tort suits for injuries suffered from private-sector nuclear accidents, Congress in 1959 turned to a separate question respecting the federal-state relationship in the regulation of the private nuclear industry: the extent to which states could or should assume responsibility for the licensing, inspection and administrative regulation of facilities in that industry. In the years between 1954 and 1959, the states had exhibited an increasing interest in the problem of radiation protection, and had adopted numerous and varied licensing and administrative schemes to deal with

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[32] [Continued]

In all these respects, the statute is the same today. 42 U.S.C. § 2210(a), (c), (e).

The AEC did not require plutonium processing plants to maintain financial protection until 1977. 10 CFR § 140.13a; 42 Fed. Reg. 46 (1977). See also Brief for the United States as Amicus Curiae, p. 15, n.18. The situation as of 1975—subsequent to the events giving rise to this lawsuit, and the year in which the Cimarron plant was closed—was explained in S. Rep. No. 94-454, 94th Cong., 1st Sess. 14 (1975):

> Financial protection and indemnity for plutonium processing facilities is discretionary with the Commission under the present law . . . The Commission does not at this time require financial protection of such licensees or extend indemnity coverage to them.

[33] Subsequent amendments of Price-Anderson in 1966, described *infra* at 29-38, confirm this intention, indeed make it even clearer.

that problem.[34] With respect to such regulation, the intent of the 1959 amendments was as follows:

> This proposed legislation is intended to clarify the responsibilities of the Federal Government, on the one hand, and State and local governments, on the other, with respect to the regulation of by-product, source, and special nuclear materials, as defined in the Atomic Energy Act, in order to protect the public health and safety from radiation hazards. It is also intended to increase programs of assistance and cooperation between the Commission and the States so as to make it possible for the States to participate in regulating the hazards associated with such materials. [S. Rep. No. 870, 86th Cong., 1st Sess. (1959) at 8].

In that context, the 1959 amendments provided that with respect to certain facilities the Commission could agree to turn over regulatory authority to states that had developed satisfactory regulatory "program[s] for the control of radiation hazards adequate to protect the public health and safety." § 274(b) and (d), 42 U.S.C. § 2021(b), (d). With respect to other facilities, the Commission was enjoined not to discontinue its regulatory responsibility. § 274(c), 42 U.S.C. § 2021(c). The Act did not in express terms forbid parallel administrative regulation by the states in those areas where the Commission would continue to regulate. But that result has been found to be what Congress intended. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, (8th Cir. 1971), *affirmed, mem.*, 405 U.S. 1035 (1972); *Pacific*

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[34] *Hearings before the Joint Committee on Atomic Energy on Federal-State Relationships in the Atomic Energy Field*, 86th Cong., 1st Sess. (1959) at 393; see also *id.* at 127-130, 134-278, 385-386; Joint Committee on Atomic Energy, *Selected Materials on Federal-State Operations in the Atomic Energy Field*, 86th Cong., 1st Sess. (1959) at 151-240.

Gas & Electric Co. v. State Energy Commission, —— U.S. ——, 51 L.W. 4449, 4455 (Apr. 20, 1983).[35]

The pertinent point here, however, is that the 1959 amendments had nothing to do with the scope of state tort law applicable in suits arising from radiation injuries. That subject had been addressed in 1957 and would be revisited in 1966. Not once in the legislative materials associated with enactment of the 1959 amendments was the subject of tort suits or tort damages even mentioned. Given this history, particularly Congress' express recognition in 1957 that state tort law would govern damage actions arising out of radiation injuries, Congress' use of the term "regulat[ion]" in the 1959 amendments cannot be understood to encompass the regulatory effects of tort litigation or, specifically, to have limited the types of recoveries available in such litigation.

(4) *The 1966 Amendments to Price-Anderson*

That the distribution of regulatory authority between federal and state governments accomplished by the 1959 Act was not intended to alter the applicability of state tort law in injury lawsuits was confirmed by Congress' actions in 1966 amending the Price-Anderson Act.[36]

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[35] See the discussion *infra*, pp. 46-48, of the reliance by the court below on *Northern States*.

[36] Congress had amended Price-Anderson in 1965 to extend its life for ten years. P.L. 89-210, 79 Stat. 855. During the hearings on the 1965 bill, the Joint Committee received suggestions that state tort law had deficiencies that might preclude compensation to some victims of nuclear incidents, and that the Act should be amended to assure tort recoveries to those injured by nuclear accidents irrespective of whether such recoveries would be available under state law. *Hearings before the Subcommittee on Legislation of the Joint Committee on Atomic Energy on Proposed Extension of AEC Indemnity Legislation*, 89th Cong. 1st Sess. 12-13, 28-29, 211-223, 266-267, 396-440 (1965) (hereinafter *"1965 Hearings"*). The Committee decided to postpone consideration of those issues until 1966, S.Rep. No. 650, 89th Cong., 1st Sess. 13 (1965), and they became the subject of the 1966 legislation described in text.

Congress had before it a variety of proposals designed to assure that victims of nuclear incidents would be compensated, notwithstanding that (1) legal rules in some states made recovery dependent upon proof of fault, (2) statutes of limitations in many states could expire prior to the victim's discovery of latent injuries from radiation, and (3) recovery in some states could not be had from nuclear operators that enjoyed governmental or charitable immunity under state law.

Congress' understanding of the role of state tort law was explained in the report of the Joint Committee on Atomic Energy:

> Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recovery from the fund established by the act is left to the tort law of the various States; the only interference with State law is a potential one, in that the limitation of liability feature of the act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity.

S. Rep. No. 1605, 89th Cong., 2d Sess. 6 (1966). At the hearings that culminated in this report, AEC Commissioner James T. Ramey had testified:

> The Price-Anderson Act provides a fund of up to $560 million from which judgments for public liability obtained by members of the public will be satisfied. Each claimant has the same standing to sue and to recover which he has with respect to liability in connection with any other industry. Similarly, each claimant is subject to the same defenses that can be asserted by any other industry.
>
> Thus, no new tort was created by the Price-Anderson Act of 1957. No new rule of liability was established, nor was there a displacement of sub-

stantive State law, except for the limitation of liability.

Hearings before the Joint Committee on Atomic Energy on Proposed Amendments To Price-Anderson Act Relating To Waiver of Defenses, 89th Cong., 2d Sess. 9 (1966) (hereinafter "*1966 Hearings*").

The 1966 Congress was persuaded that there was a federal interest in making several additional intrusions upon state tort law in those suits covered by the Price-Anderson Act that arose from a major nuclear incident: assuring that in all states the standard of strict liability, rather than negligence, would be applied in determining entitlement to compensation; assuring that statutes of limitation would be long enough to accommodate the lengthy latency period of certain radiation injuries; and assuring that operators should not be able to invoke charitable or governmental immunity to defeat recoveries. Congress recognized that accomplishing those objectives would mean overriding existing state law. However, Congress made two choices that dramatize its desire not to override state law in any respect *except* those that prompted its legislation.

First, Congress had before it two models—two ways in which it could accomplish the substantive ends described above. One, advocated by Professor Arthur Murphy of Columbia Law School, was to create a federal substantive tort law for nuclear accidents that would displace the state tort law. The other, advocated by Professor David Cavers of Harvard Law School, was to leave state tort law intact, but to require AEC licensees who were covered by Price-Anderson, as a condition of their receiving the approval of financial protection and the indemnity afforded by Price-Anderson, to waive their right to invoke enumerated state law defenses in any action brought against them. Congress opted for the latter approach. It did so for both pragmatic and substantive reasons:

(1) There was considerable doubt whether a majority in Congress would vote to enact a bill that displaced state tort law. As Joint Committee Chairman Holifield opined:

> I shudder to think of going in and imposing upon 50 States of the Union a Federal tort, new Federal tort type legislation. I am sure it would generate a tremendous amount of opposition on the principle of the thing [*1966 Hearings* at 31].

Chairman Holifield explained why the federal tort approach advocated by Professor Murphy was not going to be adopted:

> The art of legislation, of course, is the art of the possible. We are faced with such a varied set of laws in the different States, and with sensitivity as to the invasion of States' rights, that we feel that the direct approach of creating a new Federal tort would be unfeasible and impractical from the standpoint of legislative accomplishment [*Id.* at 75].

The Joint Committee's report accordingly declared that one of the considerations that had impelled the Committee to opt for the waiver approach rather than to adopt a federal nuclear tort statute was "the avoidance of the severe difficulties that would be encountered in securing agreement on such a statute." S. Rep. No. 1605, *supra*, at 10.

(2) Of greater importance, Congress did not *want* to interfere with State tort law except in the limited respects identified above. The Joint Committee was told by one of the AEC drafters of the bill that once Congress started down the road of creating a Federal tort,

> We would then have to decide whether there was any part of State law which would continue to be applicable or not.
>
> Would we have to write Federal rules of damages, Federal rules of causation? Many other kinds of problems would have to be faced. We would have to consider whether certain defenses should be al-

> lowed, certain exonerations, the question of channeling of liability, the question of recourse against suppliers, and so forth [*1966 Hearings* at 106-107].

Congress opted instead for the waiver approach because, in the words of the Joint Committee report:

> This approach . . . is in keeping with the approach followed in enacting the original Price-Anderson Act—namely, interfering with State law to the minimum extent necessary. In essence, the plan adopted permits the retention of State law with respect to the cause of action and the measure of damages, but the requirements specified for the insurance contracts and indemnity agreements [i.e., the waivers] provide the uniform rules needed to accomplish the bill's objectives [S. Rep. 1605, *supra* at 9].

In the hearings that culminated in that report, the AEC had endorsed the waiver approach because it was consistent with "the pattern we have followed of displacing State law and legislation only to the minimum extent possible" (*1966 Hearings* at 17). As explained by AEC's General Counsel, Joseph F. Hennessey:

> The amendments would not actually change the structure of the tort laws of the various states. The legal principles of state law would remain unchanged, but certain of the issues and defenses would be affected [*Id.* at 41].

Professor Cavers, whose recommendations were acknowledged by both the Joint Committee and the AEC to have been a principal influence in the shaping of the legislation (*Id.* 80, 215), had advocated the waiver approach because it "permits the retention of State law as the source of the cause of action and the measure of damages" (*id.* 80). And Chairman Holifield emphasized the surgical quality of the waiver approach as contrasted with enactment of a federal tort. The latter, he explained,

> would probably have a wider impact than we seek to achieve.

> We seek to affect one relatively small area of endeavor without getting into the "jungle" of 50 different States' laws [*Id.* at 75].

Statements on the floor of Congress by the bill's sponsors were to the same effect. Thus, Sen. Pastore, the floor manager in the Senate, explained the waiver approach as follows:

> [T]his bill follows the approach of the original Price-Anderson Act; that is, making a minimum interference with the laws of the several states insofar as legal liability for nuclear incidents is concerned. Our committee continues to endorse this general approach [112 Cong. Rec. 23633 (1966)].

And Rep. Hosmer, a member of the Joint Committee, told the House:

> This bill does not superimpose a new body of Federal law upon a segment of our traditional State tort laws . . . Through this [waiver] mechanism the Price-Anderson Act will remain true to the principle that has been a cornerstone of the act since its passage, *viz*, minimal interference with State law [112 Cong. Rec. 24637 (1966)].[37]

Second, in addition to limiting the subjects on which federal law would (via waivers) intrude upon state tort law, Congress also limited the nuclear incidents to which even that limited intrusion would be applicable. By tying the waivers to the financial protection-indemnity scheme, Congress rendered the waivers inapplicable to those nuclear operators, such as Kerr-McGee, that were not part of that scheme. S. Rep. No. 1605, *supra*, at

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[37] Reflective of just how narrow the intrusion was meant to be, Congress emphasized that if state law provided a *longer* statute of limitations than that specified in the waivers, the claimant would continue to enjoy the benefit of the longer state statute; Congress merely wished to assure that nuclear operators would have waived the right to invoke any statute of limitations *shorter* than the ten years specified in the waivers. S.Rep. 1605, *supra*, at 21.

9.[38] And even as to those operators who *were* covered by Price-Anderson the waivers would extend only to certain accidents—those that constituted an "extraordinary nuclear occurrence", or "ENO", a new term created by the bill. This limitation was explained as effectuating the general congressional desire to intrude upon state tort law only where a paramount federal interest was identified.

AEC Commissioner Ramey urged the Joint Committee that the waivers be limited to ENO's because:

> It is desirable not to invoke the mechanisms and procedures of the new system in situations which are not exceptional and which can be well taken care of by the traditional system of tort law [*1966 Hearings* at 6].

Similarly, AEC General Counsel Hennessey explained:

> It would appear eminently reasonable to avoid disturbing ordinary tort law remedies with respect to damage claims where the circumstances are not substantially different from those encountered in many activities of life which cause damage to persons and property [*id.* at 35].

The report of the Joint Committee stated the reason for limiting waivers to ENO's, and the consequence for tort actions in situations that are *not* ENO's, as follows:

> [T]he bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law . . .
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> • • • •
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> . . . [T]he committee is of the opinion . . . that there is no pressing need to invoke the mechanisms and procedures of the special waivers in situations which are not exceptional and which can well be taken care of by the traditional system of tort law. Accordingly, in the absence of some extraordinary occurrence involving a nuclear facility or device

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[38] Thus, in the instant case, plaintiff did not have the benefit of a waiver by virtue of Price-Anderson, and had to establish that strict liability would be applied as a matter of state law. App. 20a.

> or nuclear materials, traditional concepts should be allowed to prevail. . . .
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> . . . Absent such a determination [that an incident is an ENO], a claimant would have exactly the same rights that he has today under existing law—including, perhaps, benefit of a rule of strict liability if applicable State law so provides. Thus, this bill in no way provides for deprivation of a claimant's existing rights [S. Rep. 1605, *supra*, at 11-12.

On the House floor, Rep. Hosmer reiterated that for nuclear incidents that are not ENO's "there are still remedies, the usual ones, and the usual means for settling a claim." (112 Cong. Rec. 24634 (1966)). The bill was enacted without change, Pub. L. 89-645, 80 Stat. 891, and remained unchanged at the time of the incident giving rise to this action—indeed remains so today—in the respects that were the subject of these discussions. See 42 U.S.C. § 2210(n)(1).[39]

A description of the legislative history of the 1966 amendments to Price-Anderson would not be complete without mentioning the one explicit reference to punitive damages that occurred therein. As already noted, Professor Cavers of Harvard Law School played an influential role with respect to the 1966 amendments. He had published a law review article in 1964 urging essentially the scheme enacted in 1966 (a waiver approach ap-

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[39] It is an indication of how limited an intrusion upon state law was accomplished by the 1966 amendments that the Three Mile Island accident did not qualify as an ENO, 45 Fed. Reg. 27590-95 (1980), although it had been declared by the Nuclear Regulatory Commission to be "the most serious nuclear accident to date at a licensed U.S. facility", 44 Fed. Reg. 43128 (1979). Thus, the waivers were not applicable, and state law applied unqualifiedly (except for the $560 million limit of liability), to the lawsuits brought as a result of that accident. A class action on behalf of those living nearby was later settled for $25 million. U.S. Nuclear Regulatory Commission, *1981 Annual Report* at 107.

plicable to strict liability, statutes of limitations, and immunities). *Cavers, Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv. L. Rev. 644 (1964). He had testified before the Joint Committee in *1965* in support of his proposal, *1965 Hearings, supra* n. 36, at 211-223, and his law review article was made an exhibit to those hearings, *id.* at 396-440. While Congress deferred consideration of his proposal until 1966, Chairman Holifield explained in 1966 that "[h]is testimony before the Joint Committee last year was largely influential in the committee's decision to proceed with the hearings which are being conducted today," *1966 Hearings* at 80.

Professor Cavers' law review article, in addition to the other suggestions that ultimately were adopted by Congress, proposed two amendments that would go to the "measure of damages". 77 Harv. L. Rev. at 662-664; *1965 Hearings* at 414-416. One of these was that "recovery of punitive damages should be denied in all nuclear cases", 77 Harv. L. Rev. at 663-664; *1965 Hearings* at 415-416. In this regard, he noted that Congress had included an express prohibition against punitive damages in the Federal Torts Claims Act, 28 U.S.C. § 2674 (*Ibid*).

Professor Cavers' suggestion was not prompted by the consideration that fueled the Tenth Circuit in this case (*i.e.*, that punitive damages "compete" with the federal regulatory scheme), but rather by his belief that as a matter of policy they ought not to be available against operators covered by Price-Anderson. Given that Kerr-McGee was not covered by Price-Anderson (see n. 32, *supra*), Professor Cavers' proposal presumably would not have been applicable to this case. But Congress, although adopting most of Professor Cavers' suggestions, did not adopt his suggestion that punitive damages be prohibited. On the contrary, as the Joint Committee's report emphasized, "this bill in no way provides for deprivation of a claimant's existing rights" (*supra*, p. 36). Thus, Professor Cavers' proposal respecting punitive dam-

ages is significant only for its implicit premise that without an express statutory exclusion punitive damages could be recovered in suits covered by the Price-Anderson Act, and for the fact that Congress, although adopting most of his suggestions, did not enact a prohibition against punitive damages.

(5) *The AEC's Implementation of the 1966 Amendments*

The 1966 Price-Anderson amendments assigned the AEC the responsibility for designing revised insurance and indemnity agreements that would incorporate the waivers. 42 U.S.C. § 2210(n)(1). The AEC's implementation of that responsibility makes unmistakably clear that the AEC understood that federal law did *not* preempt punitive damages claims, even against operators covered by Price-Anderson, and even in the case of ENO's.

The insurance agreement and indemnity agreement contained in the AEC's proposed rule, after reciting the waivers being made by covered operators in the event of an ENO (including waivers of state statutes of limitations and state-conferred immunities from suit),[40] contained the following provision:

> The waivers set forth above . . . do not apply to—
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> • • • •
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> Any claim for punitive or exemplary damages . . .[41]

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[40] 33 Fed. Reg. 6978, 6984, 6985, 6986 (1968).

[41] *Ibid.* As originally proposed, and as it exists today, 10 C.F.R. § 140.91, Appendix A, para. 2(c) at 730, this clause is followed by a proviso:

> provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law.

The reason for this proviso is evident from the description that follows in text: Congress wanted waivers of state law sufficient to assure recovery of compensatory damages.

The rule was adopted in the form proposed, and has remained the same over the ensuing 15 years.[42] Thus, a covered operator sued in an ENO has not waived the right to resist a punitive damages claim on the ground that the state statute of limitations has run, or that the operator enjoys charitable or governmental immunity under state law. The AEC explained its reason for including this limitation upon the waivers:

> It has also been deemed advisable to make the waivers inapplicable to claims for punitive or exemplary damages, since the intent of the legislation is to assure compensation for injury or damage from an extraordinary nuclear occurrence. [33 Fed. Reg. 6982 (1968).]

"[T]he legislation" whose intent is referred to is the 1966 Act amending Price-Anderson, the only Act that assures compensation for injury from an ENO. As the intent of that Act in requiring waivers was to assure *compensation* notwithstanding state limitations and immunity laws, the AEC was entirely correct in its conclusion that the Act should not be implemented to intrude upon state law by making available punitive damages *in circumstances where the state law would not permit them* (*i.e.*, where they are barred by the statute of limitations and/or by the defendant's charitable or governmental immunity).

For purposes of the present case, the importance of the AEC's conduct is its recognition that punitive damages are not preempted, even in the case of an operator covered by Price-Anderson who has caused an ENO. For if they *were* preempted, there would have been no reason to preserve the operator's entitlement to invoke state limitations and immunity defenses. And it follows *a fortiori* that the AEC recognized that punitive damages are not preempted in a minor incident (*i.e.*, one not an ENO) or one caused by an operator not covered by Price-Anderson, for the legislative materials we have quoted make clear

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[42] 10 C.F.R. § 140.91, App. A, ¶ 2(c) at 730; § 140.92, Art. II, ¶ 5(d) at 735.

Congress' intent not to intrude at all on the operation of state law in those situations.

The contemporaneous views of an administrative agency charged with initial implementation of a new federal statute are, of course, entitled to great weight. *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961) (Atomic Energy Commission); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). This is especially so here, for the AEC played a key role in the shaping of the 1966 legislation,[43] and likewise had actively participated in the congressional consideration of each of the bills that collectively contributed to the corpus of atomic energy law through 1966.[44]

(6) *Extension of Price-Anderson in 1975*

In 1975, Congress extended the life of Price-Anderson for another ten years. P.L. 94-197, 89 Stat. 111. The Joint Committee's report reiterated that state tort law governs damage actions except in the instances enumerated in the Act, and the 1975 Act did not alter that enumeration. S. Rep. No. 94-454, *supra*, at 7-9.[45]

(7) *Conclusion Respecting the Congressional Intent*

In sum, there is not a word in the statute, nor in the legislative history spanning several decades of amendments,

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[43] See pp. 30-33, 35, *supra*; see also S. Rep. No. 1605, *supra*, at 4-5 (1966).

[44] S. Rep. No. 1699, *supra*, at 3 (1954); S. Rep. No. 296, *supra*, at 1-4, 7 (1957); S. Rep. No. 870, *supra*, at 3-7 (1959); S. Rep. 650, *supra*, at 2, 13 (1965).

[45] The 1975 amendments provided for a "phase out" of government indemnity, with industry-financed protection filling the gap. S. Rep. No. 94-454, *supra*, at 9-10. By 1981, the "phase out" had progressed to the point that the first $535 million of protection was provided through industry-financed means, and the government indemnity had been reduced to the $25 million necessary to cover losses exceeding $535 million up to the $560 million limit of liability. NRC 1981 Annual Report, *supra*, at 106-107.

suggesting that Congress intended to take from the states their traditional power to authorize punitive damage awards when tortious conduct has been accompanied by a culpable state of mind.[46] On the contrary, Congress repeatedly announced that state tort law is to control unqualifiedly in the resolution of damage actions against nuclear operators (such as appellees here) not covered by Price-Anderson, and that even in the case of operators covered by Price-Anderson state tort law is to control except to the limited extent that it has been expressly overridden in the federal statute. Those instances of federal intrusion are clearly spelled out in the statute, and punitive damages are not among them; indeed, the one suggestion that federal law should preempt punitive damages was not adopted (pp. 36-38, *supra*). Moreover, the Atomic Energy Commission—the administrative agency responsible for implementing the federal statute—demonstrated contemporaneously with passage of the 1966 amendments its understanding that punitive damages claims are not preempted (pp. 38-40, *supra*).

B. The Decision Below Rests On Defective Premises

As we have seen, Congress has repeatedly and unequivocally declared a purpose *not* to preempt traditional state law tort remedies. That evidence provides the complete answer to the preemption issue presented in this case.

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[46] Congress understood that tort rules varied from state to state, and its intent was to leave the states free to apply their tort rules *whatever* they might be (pp. 32-34, *supra*). It is noteworthy that in both 1957 and 1966 all but a handful of states authorized punitive damages in tort actions. Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518 (1957); Prosser, *Handbook of the Law of Torts* (2d Ed. 1955) at 9. While the grounds upon which punitive damages could be awarded varied between the states, the predominant view in 1957 and 1966 was that they were available where the defendant's culpable conduct stemmed from either an intent to harm or a reckless disregard of the safety of others. *Restatement of the Law of Torts* (1939), § 908, comment b; Prosser, *supra*, at 9-10; McCormick, *Handbook of the Law of Damages* (1935), at 280-281; Note, *supra*, 70 Harv. L. Rev. at 517.

The court below, disregarding that evidence, chose instead to resolve the preemption issue as if Congress had been silent on the question. The court below looked to Congress' treatment of a *different* question—the role reserved to the federal government in licensing and administratively regulating nuclear safety—and derived its solution by logical inference from Congress' decision there. But when Congress gives direct evidence of its intent respecting preemption, a contrary intent is not to be derived by abstract logic and inference. Moreover, even on its own terms, the decision below cannot survive analysis.

The court below found preemption by the following reasoning: The Atomic Energy Act, as amended, places administrative regulation of radiation hazards at private nuclear facilities exclusively in the hands of the AEC (NRC); "[a] judicial award of exemplary damage under state law [is] punishment for bad practices or to deter future practices involving exposure to radiation"; and, therefore, an award of punitive damages "competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." App. 23a-24a.

This reasoning misapprehends both the nature of punitive damages and the relationship of such damages to the scheme Congress has adopted to govern hazards and injuries caused by exposure to radiation emanating from privately-owned nuclear facilities. When these factors are properly understood, there is no tension between the power to award punitive damages in cases such as this and the federal regulatory scheme.

1. Even the court below recognized (App. 18-20) that Congress did not leave *all* "regulation" of radiation hazards solely in the hands of federal authorities. The court below understood that Congress unquestionably left to state tort law the task of providing compensatory damages for injuries suffered from radiation hazards at pri-

vate nuclear facilities, and the power to determine the criteria by which liability for such damages would be adjudged. And it is axiomatic that the power to set the standards for tort liability and to award compensatory damages pursuant to those standards carries with it the ability to regulate primary conduct. As this Court recognized in *San Diego Unions v. Garmon*, 359 U.S. 236, 247 (1959):

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

See also, *Smith v. Wade*, —— U.S. ——, 51 L.W. 4407, 4413 (Apr. 20, 1983). For example, the court below understood that even if a nuclear operator has fully complied with the regulatory standards imposed by federal law and federal agencies, Congress intended that the states would be free to impose—as Oklahoma has—compensatory liability under a strict liability standard (App. 18a-20a). The effect of that congressional judgment is to create an incentive for nuclear operators in states like Oklahoma to achieve a level of safety beyond that imposed by federal regulations. Thus, the premise of the court below—that any element of state tort law that is "regulatory" in nature "competes" with the federal regulatory scheme and should be deemed preempted—is flatly at odds with its own recognition of Congress' intent to permit recovery of compensatory damages under state law standards.

2. Punitive damages do not regulate any practices involved in the operation of nuclear facilities that are not subject to regulation by compensatory damages. Indeed, punitive damages involve less direct regulation of safety practices than compensatory damages. While compensatory damages serve to regulate directly the practices of private nuclear operators with respect to radiation has-

ards, punitive damages serve a quite different interest—one that belongs peculiarly to the states. Punitive damages are not awarded based on the level of radiation that may have been emitted at a particular facility—which is the subject of federal interest and regulation. Punitive damages are awarded because, whatever the level of radiation emission, injury has resulted from "outrageous" conduct on the part of the defendant. Thus, as explained in the *Restatement of the Law of Torts, Second* (1977):

> [T]hese damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime. The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others . . . Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages [§ 908, comment b].

The "distinctive feature" of punitive damages is that "a positive element of conscious wrongdoing is always required". *McCormick on Damages* 280 (West, 1935). "Exemplary damages are awarded only when the defendant's behavior resulted from an evil state of mind, such as spite, ill-will, or recklessness." Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957). Accord: *Prosser on Torts* 9-11 (4th Ed. 1971).[47] In this light, it is hardly surprising that there

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[47] See also, *Smith v. Wade*, —— U.S. ——, 51 L.W. 4407, 4409-10 n.6, 4419-20 (Apr. 20, 1983), in which both the majority and dissenting opinions recognize that in modern jurisprudence a culpable subjective state of mind is the prerequisite to awarding punitive damages. The Oklahoma punitive damages statute, as implemented by the trial judge in this case, fully accords with this conception of the role of punitive damages. By its terms, the Oklahoma statute authorizes punitive damages "where the defendant has been guilty of oppression, fraud or malice, actual or presumed". 23 O.S.

[Footnote continued on page 45]

is no prior case involving any federal statute in which punitive damages under state law were held preempted by federal law when compensatory damages were not.

3. States have a special interest in policing conduct motivated by a malicious or reckless state of mind that endangers the health and safety of their citizens—whether that conduct involves operating a nuclear facility or driving a car. And, there is no federal interest in sheltering those who act with such motivation from the punishment the state law provides. The words of this Court in *San Diego Unions v. Garmon*, 359 U.S. at 243-244, are in point here:

> [D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal statute]. . . . Or where the regulated conduct touched

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[47] [Continued]

§ 9. The phrase "malice . . . presumed" has been construed in Oklahoma decisional law to mean "disregard for the public safety [that] reflects a basic disrespect for the interests of others." *Thiry v. Armstrong World Industries*, —— P.2d ——, 54 Okla. Bar. Assn. Journal, 782, 785 (1983).

> "Reckless disregard" is not to be confused with inadvertent conduct. To meet this standard the [wrongdoer] must either be aware of, or culpably indifferent to, an unnecessary risk of injury [*Ibid*].

See also, *Dayton Hudson Corp., supra*, 621 P.2d at 1161 and n.25 ("positive wrongdoing", which includes " 'reckless disregard' of the safety of others"); *Chicago, R.I. & P. Ry. Co. v. Wells*, 156 P. 314, 315 (1916) ("reckless disregard of the rights of others"). Consistent with this standard, the trial judge charged the jury in this case that the prerequisite for an award of punitive damages was "evil intent," a state of mind consisting of either ill-will or reckless disregard (App. 112a-113a). By its award of punitive damages, the jury found that Kerr-McGee possessed the requisite culpable state of mind; the trial judge held that that finding was supported by the evidence; and the court below did not disturb that holding.

> interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

See also, *e.g.*, *United Automobile Workers v. Russell*, 356 U.S. 634 (1958); *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 (1954).

As shown by cases like *Russell* and *Laburnum*, in which the issue concerned preemption of compensatory and punitive damages by the National Labor Relations Act, this Court has refused to abrogate those state tort rights that are "deeply rooted in local feeling and responsibility" even where, unlike here, Congress has otherwise generally preempted state law tort actions in favor of a federal adjudicatory scheme that provides remedies to injured persons. In that regard, this Court's decision in *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977) is particularly instructive:

> No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." . . . Thus, as in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), and *Automobile Workers* v. *Russell*, *supra*, permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.
>
> The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained.

4. The court below thought, however, that preemption of punitive damages was dictated by this Court's summary affirmance of *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035

(1972). The points already made show why *Northern States* is inapplicable here.

In that case, the Minnesota Pollution Control Agency conditioned issuance of a waste disposal permit to a nuclear power plant upon the plant's meeting state-prescribed standards for the discharge of radioactive effluents that were more stringent than those prescribed by the AEC. This was, of course, a classic case of overlapping administrative regulation dealt with in the amendments enacted by Congress in 1959, 42 U.S.C. § 2021, and the *Northern States* court found its answer (that the state's regulation was preempted) solely from consideration of that 1959 legislation. Key to the *Northern States* decision was the provision in the 1959 legislation codified as 42 U.S.C. § 2021(k):

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

Although the 1959 legislation did not in terms prohibit state agencies from imposing standards for the discharge of radioactive effluents more stringent than the AEC's standards, the court in *Northern States* drew from § 2021(k) the negative inference that the 1959 Act *did* deny State and local agencies the right to regulate for the purpose of "protection against radiation hazards" and thus preempted the regulation attempted by the Minnesota Pollution Control Agency, 447 F.2d at 1149-50.

As we have seen, the role of state law in damage actions was not the subject of Congress' consideration in 1959, and that role is not controlled by the 1959 legislation. While state regulatory agencies may not prescribe regulatory standards more stringent than the AEC's, it hardly follows that state laws cannot authorize punitive damages for reckless disregard of the safety of others.

Moreover, even if § 2021(k) were the appropriate place to look for Congress' intent respecting punitive

damages, punitive damages are designed for "purposes other than protection against radiation hazards". As shown *supra*, at pp. 43-46, the punishment and deterrence that punitive damages are designed to accomplish are not directed to particular levels of radiation emission or indeed to radiation hazards at all; rather, the state seeks to punish and deter conduct—whatever its particular manifestation—that is outrageous. If a corporate board of directors acted to rid itself of a particularly annoying critic of nuclear power by mixing plutonium from the plant into food served that critic, it could hardly be contended that a state court, by awarding punitive damages, was doing so for the "purpose" of "protection against radiation hazards" in the sense Congress intended by those words. The purpose actuating the state court in those circumstances would have been idenical, and the award of punitive damages the same, if the particular poison used had been cyanide rather than radiation. The state court would be punishing and deterring outrageous conduct, not regulating exposure to plutonium. Indeed, it would be wholly irrelevant to a state court in such a case what *quantity* of plutonium was employed for the poisoning, or whether that quantity was within or without the numerical exposure limits stated in AEC regulations. For the state would not be protecting against radiation hazards as such, but against "bad actors"—persons (or corporations) whose conduct results from attitudes towards the health and safety of others that do not adhere to civilized standards.

And, of course, it should not be overlooked that if punitive damages are preempted, so equally would be criminal penalties, for which punitive damages are a civil analogue. (Prosser, 4th Ed., *supra*, at 9; Restatement (Second), *supra*, § 908, comment a.) The court below implicitly recognized that its decision meant that both were preempted; it found that result appropriate, for:

> The AEC (NRC) has comprehensive powers to punish and prohibit practices it regards as improper, through its power and responsibility to license, 42 U.S.C. § 2131, investigate, *id.* § 2271, enjoin, *id.* § 2280, and seek civil and criminal penalties. *Id.* §§ 2272, 2273, 2282 [App. 24a].

The court below ignored that the practices the AEC (now NRC) "regards as improper" are not coincident with those that Congress left the states free to "regard as improper" in the application of their tort law. The NRC can seek punishment of violations of its regulations, *e.g.*, exposures exceeding the limits prescribed in its regulations. But the NRC cannot seek punishment for murder, nor for actions taken in reckless disregard of the safety of others, except where coincidentally those actions—independently of the state of mind actuating them—happen to violate NRC regulations. And even where that coincidence exists, the crux of the federal interest—the reason that Congress preempted *administrative* regulation of radiation hazards—lies in assuring the objective safety of nuclear facilities, not in punishing those who operate them with a malevolent or reckless state of mind.

In sum, the function of punitive damages in Oklahoma—to punish and deter conduct actuated by ill-will or reckless disregard for the rights of others—is wholly peripheral to federal regulatory concerns, but is at the core of "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. As we have seen, there is not here the requisite "compelling congressional direction" to preempt state tort law; there is, to the contrary, a clear and consistent congressional directive that state tort law is to govern.[48]

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[48] Because the congressional intent not to preempt is so clear, we do not present a full argument on the constitutional question that

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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would be presented if Congress *had* acted to preempt. Under Oklahoma's statute, plaintiff had a right to submission of her punitive damages claim to a jury—a property right protected by the Fourteenth Amendment, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). That right has proved in this instance to be of great monetary value. Congress did not provide a federal scheme for regulating culpably-motivated conduct that adequately substitutes for that provided by Oklahoma's punitive damage statute, nor did Congress make any determination that there was a federal interest that would be served by preemption. In these circumstances, a congressional decision to preempt would be "demonstrably arbitrary or irrational." *Duke Power Co.*, *supra*, 438 U.S. at 84.